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IN THE

Supreme Court of the United States

October Term, 1962

No. 265

RONALD CARR,

Appellant,

—against—

THE STATE OF NEW YORK,

Appellee.

APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, THIRD JUDICIAL DEPARTMENT

BRIEF OF APPELLANT IN OPPOSITION TO MOTION TO DISMISS

IRWIN N. WILPON
Counsel for Appellant
50 Court Street
Brooklyn 1, New York

32 CASE PRESS INC., 421 Hudson St., N. Y.—ORegon 5-4540

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The opinions below, facts as to jurisdiction, statutes involved, question presented and the statement of the case are set forth in the jurisdictional statement filed by appellant.

(1)

If the application of the statute to the appellant was invalid, as repugnant to the federal constitution, the State was unjustly enriched by the payment to it of the monies due appellant and upon its refusal of appellant's demand therefor, was liable to appellant in an action for money had and received.

As stated in *MacMurray v. City of Long Beach*, 292 N. Y. 286, 291:

> "Finding in the complaint allegations which, if proved, would establish that the defendant has re-

> ceived from the plaintiff a sum of money which it could not in good conscience retain and that the defendant has refused to pay over the same after demand therefor, a cause of action for money had and received is stated."

The notice of claim is, under the New York Court of Claims Act (Sec. 11, Court Rule 9), required to briefly state the underlying facts (*Harvey Chalmers & Son Inc.* v. *State of New York*, 271 App. Div. 699, 701, 68 N. Y. S. 2d 827, 830 affd. 297 N. Y. 690). The notice of claim in this case thus briefly makes such claim for money had and received. The basis of the claim is the unjust enrichment. The legal points establishing unjust enrichment are not required to be alleged in the notice of claim, but are presented to the Court upon the adjudication of the claim.

Upon a motion for judgment on admissions, as is stated in the jurisdictional statement (pp. 5-6), affidavits are not permitted and the legal contentions are required to be set forth in the briefs of the parties. In the jurisdictional statement, appellant states (p. 6) that the same two there quoted points raised in the Appellate Division were raised by appellant in his brief in the Court of Claims, which, was of course, served on counsel for the appellee. Undoubtedly, in preparing this motion to dismiss, counsel for appellee checked appellant's brief in the Court of Claims and found that the following points were raised in said brief:

Point I

If the State's construction of the statute be accepted, the statute is unconstitutional, since it deprives the claimant of his property without due process of law and impairs the obligation of contract in contravention of the fourteenth amendment and Article I, Section 10 of the Federal Constitution and Article 1, Section 6 of the State Constitution.

Point II

The statute can be sustained as constitutional only if it be interpreted to include therein a remedy against the State for the recovery by a bettor, who has lost or unintentionally destroyed his ticket, of the share of the win pool belonging to him.

In appellant's brief in the Appellate Division (p. 6), the very first sentence of argument under the "First Point" quoted at page 6 of the jurisdictional statement states: "Although the opinion of the Court of Claims does not mention it, this point was raised below." Neither in its brief nor in oral argument in the Appellate Division, did appellee contend that this statement in appellant's brief was incorrect.

Despite his evident knowledge of the points raised by appellant in the Court of Claims, counsel for appellee at page 3 of his brief on this motion, purports to profess ignorance thereof and creates the inference that no claim under the federal constitution was made in that court. Counsel then makes what is nothing less than a deliberate misstatement (Brief, p. 3) that "constitutional rights were belatedly asserted in appellant's brief in the Appellate Division."

Further spinning his web of deceit, counsel for appellee

the Court of Appeals on constitutional grounds and thereby is committed to the non-existence of a constitutional question.

In his affidavit in support of appellant's motion in the Court of Appeals for leave to appeal, a copy of which was, of course, served upon and is in the possession of counsel for the appellee, appellant's counsel stated at pages 6-7 thereof:

> "In the Court of Claims and in the Appellate Division, the claimant contended, that the application to the claimant of the statute as construed by the State was repugnant to the Federal and State Constitutions and that the statute could be sustained as constitutional only if it be construed to afford claimant a remedy against the State to recover the moneys admittedly his share of the pari-mutuel pool.
>
> The Court of Claims and the Appellate Division did not in their opinions discuss the constitutional question raised by appellant, but confined their opinions to holding that the statute bars the claimant from recovering said moneys from the State (135-141; pp. 28-29, 39-40 annexed hereto). However, the Courts below necessarily overruled claimant's contentions that the statute as applied to him was unconstitutional, in order to hold that the statute was a bar to recovery by claimant. The opinion of the Court of Claims is reported in 30 Misc. 2d 983. The opinion of the Appellate Division is reported in 15 A. D. 2d 709.
>
> The question of the construction of the statute so as to afford claimant a remedy was urged by the claimant as an alternative by which the Court could avoid holding, as contended by claimant, that the statute as applied to him by the State was repugnant to the Federal and State Constitutio . Because such alternative point was raised below, there is a ques-

tion whether an appeal lies nevertheless as of right on such constitutional question (*Valz* v. *Sheepshead Bay Bungalow Corp.*, 249 N. Y. 122, 132, cert. den. 278 U. S. 647; *Matter of Kohnberg*, 5 N. Y. 2d 859) or whether such alternative question as to construction precludes an appeal as of right (*Matter of Cortes*, 5 N. Y. 2d 917; *Matter of Rueff*, 273 N. Y. 530; *Peo. ex rel. Ryan* v. *Lynch*, 262 N. Y. 1, 4; *Matter of Chirello*, 283 N. Y. 417, 420; *Powers* v. *Porcelain Insulation Corp.*, 285 N. Y. 54, 56-57; *Matter of Wallace*, 6 N. Y. 2d 843; *Pomeranz* v. *City of New York*, 3 N. Y. 2d 885; *Yaras* v. *City of Albany*, 305 N. Y. 580). Because of such uncertainty on his part, claimant has deemed it expedient to move for permission to appeal.

A brief covering the questions of law raised in the Courts below is annexed hereto."

In his brief in the Court of Appeals in support of said motion the appellant raised the following points on which he sought review:

FIRST POINT

The application to the appellant of the pari-mutuel revenue law, as construed by the courts below, is repugnant to the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Federal Constitution and of Article 1, Sections 6 and 11 of the State Constitution and of the Impairment of the Obligation of Contract Clause in Article I, Section 10 of the Federal Constitution.

SECOND POINT

The statute as applied to appellant can be sustained as constitutional only if it be interpreted to include therein a remedy against the State for the recovery by a bettor, who has lost or unintentionally destroyed his ticket, of the share of the win pool belonging to him.

The appellee, in his brief in the Court of Appeals in opposition to appellant's motion for leave to appeal, not only did not deny but confirmed that this constitutional question was raised in both lower courts and that it was raised and sought to be reviewed in the Court of Appeals. The first sentence in said brief opposing such constitutional review states (p. 3): "The claimant's contention that the statute as applied to him by the courts below is unconstitutional is based upon faulty premises and analogies."

Building upon his false thesis that the constitutional question was not presented in the State courts, counsel for appellee seeks to create the false impression (Brief, p. 3) that the refusal by the Appellate Division, to grant appellant's motion to amend its remittitur to show that this constitutional question "was presented and necessarily passed upon", though without opinion (16 A. D. 2d 858), was upon the untrue ground that the question was not presented for review in the motion in the Court of Appeals for leave to appeal. Significantly, he does not controvert appellant's contention at pages 7-8 of the jurisdictional statement that, though remaining silent on this constitutional question, the Appellate Division necessarily passed on it.

If the Appellate Division, although appellee does not so claim here, denied the motion to amend the remittitur because it had not passed upon the constitutional question, it would have been simple for it to say so in one brief sentence. The Court of Appeals of New York, in denying such a motion, invariably states its reason briefly (See: *Matter of Police Benevolent Ass'n. v. Gagliardi*, 10 N. Y. 2d 749). As stated in the jurisdictional statement (p. 8), the Appellate Division could not very well state that it had applied the

statute to appellant and had not passed upon the claim by appellant that such application to him was in violation of his constitutional rights, which contention was properly presented to it under New York procedure. To say that it had not passed upon this question would be a statement by the Court that it had deliberately refused to consider and adjudicate appellant's claim that his constitutional rights were violated. Such refusal to even consider and adjudicate such properly raised constitutional claim would be a denial of due process even more monstrous than the expropriation and confiscation of appellant's money. In such case, this Court would redress such patent denial of due process by vacating the judgment of the State court and remanding the cause with direction to consider and adjudicate appellant's claim that the State had unconstitutionally applied its statute to him (*Minnesota v. National Tea Co.*, 309 U. S. 551, 555-556, 84 L. ed. 920, 923, 60 S. Ct. 676, 679). Otherwise, the State court would have devised a method by which appellant, who had properly raised the claim in all the courts that his constitutional rights were violated, would be thrown out of court without having his constitutional claim considered in any court, anywhere.

It is clear, however, that the State court did necessarily pass upon and reject appellant's constitutional claim which was not only properly presented to it, but, which was the contention upon which appellant's brief and oral argument were founded, and that the sustaining of the validity of the statute by such rejection is properly before this Court for review on this appeal.

(2)

Although the appellee's motion is to dismiss for want of jurisdiction, appellee has interspersed its brief with its argument on the merits, thus, in effect, joining with it a motion to affirm, though not making any motion to affirm. Rather than thereby indicating that the federal question raised by appellant is not substantial, appellee, it is submitted, seems instead to establish that its own argument on the constitutional question is insubstantial.

The pari-mutual revenue statute, as construed by the courts of New York State, is designed to raise revenue for the State. Under such statute, the State takes eleven per cent of the monies in the wagering pool as its tax thereon, the racing association takes four per cent as its share, and the balance is distributed to the winners upon presentation of their tickets (Section 9, Jurisdictional Statement p. 31). The money to be so distributed is held by the racing association until April first of the succeeding year, at which time the balance remaining unclaimed is paid over to the State (Section 12, Jurisdictional Statement p. 33). The statute includes in the term "unclaimed balance" the monies due purchasers of winning tickets who have lost or inadvertently destroyed them, despite the fact that these purchasers might not, in fact, fail to claim them. The appellant here, aggressively and vociferously made claim to such winnings within minutes after the race was run and continuously thereafter. It is thus the design of the statute to forfeit and expropriate to the State as "revenue", in addition to the tax thereon already collected by the State, the entire proceeds of such lost or inadvertently destroyed tickets since the statute prohibits the racing association from paying out to admitted purchasers, who have thus inadvertently destroyed their tickets and re-

quires it to pay such monies instead to the State. Since the enactment of the statute in 1940, in the language of the State Tax Department itself: "we receive similar type letters monthly under various circumstances in which the person who originally purchased the winning tickets had lost or destroyed same" (R. 39). The State nevertheless advises such purchasers as the State Tax Commission advised appellant on May 11, 1959: "In view of the information contained in your letter of April 29, the sum of $1295.00 which represents the value of these two destroyed winning tickets will be part of the unclaimed ticket money paid over to the State on April 10, 1960 by the New York Racing Association" (R. 28).

The State contends that the expropriation of these monies is valid in all cases without exception as a revenue provision and does not offend the federal constitution regardless of the facts to which the statute is applied.

Thus, in the case cited in the footnote at page 2 of its brief on this motion, a purchaser of three winning tickets died at the track before he could present them for payment. Employees of the undertaker stole the tickets. Upon their arrest, the district attorney, as the enabling act (N.Y. Laws 1960, ch. 372) discloses, impounded the tickets and refused to turn them over to the estate of the purchaser for presentation until after the presentation period had expired and the track, as required by the pari-mutuel statute, had paid the "unclaimed" money to the State. The State contends that in such case, the proceeds nevertheless belonged to the State as "revenue" and that a special statute was necessary before the State could be required to pay these monies over to the rightful owner. It is quite clear that no such special statute was necessary. If the owner's estate had brought an action against the State for

money had and received and raised the contention that such application of the statute to it was so shocking as to be repugnant to the Due Process Clause, the State's expropriation of the money would not be sustained. In such a case, the claimant's recovery of the money would not be dependent on whether or not, as an act of grace, the State deigned by special statute to give up money belonging to the State, but on the claimant's right to money which never rightfully belonged to the State but to the claimant.

Similarly, if for example, a purchaser of a pari-mutuel ticket, just after the ticket had been punched out to him, was still waiting at the window for his change and put his hand, with the ticket in it, to his mouth to light a cigarette and the matches had suddenly flared up and ignited and burned up the ticket in the presence of the ticket seller, it would be shocking and a clear deprivation of property without due process of law for the State, by its statute, to hold that prospective winnings on the ticket, then and there became the absolute property of the State, since the ticket could never be presented for payment, and that the purchaser by such inadvertent destruction of the ticket had forfeited his admitted winnings to the State.

Yet, though not so graphically or dramatically, that is what happened here. The State admits that to its knowledge, acquired within minutes after the purchase, the appellant was the purchaser of these particular winning tickets and within minutes, even before the race was run, inadvertently destroyed them. Yet the State courts have held that when the tickets were thus inadvertently destroyed, the winnings thereon then and there became the property of the State, unless the appellant complied with the impossible condition of presenting the tickets within the time limitation.

The case of *Aliano* v. *Westchester Racing Assn.*, 265 App. Div. 225, cited by appellee at page 4 of its brief, was an action against the track and not the State which involved only the construction of the statute and not the federal constitutional question presented here. The State cannot by the construction of the statute by its courts prior to the assertion of this federal constitutional claim by appellant cotain immunity for its statute from challenge on federal constitutional grounds as appellee seems to claim at pages 4-5 of its brief. If this were so, the States could insulate all their statutes against constitutional challenge to their validity and thus nullify the Fourteenth Amendment.

CONCLUSION

The motion to dismiss should be denied and probable jurisdiction noted.

Respectfully submitted,

Irwin N. Wilpon,
Counsel for Appellant.

August 1962